IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

WEDNESDAY, THE 12TH DECEMBER 2007 / 21ST AGRAHAYANA 1929

WP(C).No. 12354 of 2007(U)

PETITIONER:

LARSEN & TOUBRO LTD, A COMPANY INCORPORATED UNDER THE PROVISIONS OF COMPANIESACT, 1956, HAVING ITS REG.OFFICE AT L&T HOUSE, BALLARD ESTATE, PO BOX NO.8278, MUMBAI-400001 REP.BY ITS POWER OF ATTORNEY HOLDER SRI.V.R.SUBRAMANIAN, BRANCH MANAGER, "SKYBRIGHT" BUILDING,M.G.ROAD, EKM

BY ADV. SRI.K.P.DANDAPANI (SR.)
SRI. PANKAJ SAVANTH FROM BOMBAY

SRI.P.V.SREENIJIN
SMT.K.B.SONY
SRI.MATHEWS K.UTHUPPACHAN
SRI.PAUL MATHEW (PERUMPILLIL)

RESPONDENTS:

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1. COCHIN SHIPYARD LIMITED,(A GOVT.OF INDIA ENTERPRISE), A COMPANY INCORPORATED UNDER THE PROVISIONS OF COMPANIES ACT, 1956, HAVING ITS REGISTERED OFFICE AT PO BOX NO.1653, PERUMANOOR, COCHIN - 682 015.

2. GOA SHIPYARD LIMITED, (A GOVT. OF INDIA ENTERPRISE), A COMPANY INCORPORATED UNDER THE PROVISIONS OF COMPANIES ACT, 1956, HAVING ITS REGISTERED OFFICE AT VASCO DO GAMA, GOA - 403802.

R1 BY ADV. SHRI SAJI VARGHESE, SC.

R2 BY ADV. SHRI SHAFFIQUE.

BY ADV. SRI.TOM K.THOMAS
SRI.A.M.SHAFFIQUE
SRI.E.K.NANDAKUMAR
SRI.A.K.JAYASANKAR NAMBIAR
SRI.ANIL D. NAIR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 31.10.2007, THE COURT ON 12.12.2007 DELIVERED THE FOLLOWING:

APPENDIX IN W.P.(C). NO.12354 OF 2007 U

EXT.P1 TRUE COPY OF LETTER DATED 23.2.2006 ISSUED BY 1ST RESPONDENT TO PETITIONER.

EXT.P2 TRUE COPY OF LETTER DATED 15.4.2006 SUBMITTED BEFORE THE 1ST RESPONDENT.

EXT.P3 TRUE COPY OF LETTER DATED 28.8.2006 ISSUED BY 1ST RESPONDENT TO THE PETITIONER.

EXT.P3(A) TRUE COPY OF LETTER DATED 7.12.2006 ISSUED BY PETITIONER TO 1ST RESPONDENT.

EXT.P3(B) TRUE COPY OF RELEVANT PORTION OF CLAUSE 16 OF TENDER DOCUMENT.

EXT.P4 TRUE COPY OF LETTER DATED 23.2.2007 ISSUED BY 1ST RESPONDENT TO PETITIONER.

EXT.P5 TRUE COPY OF LETTER DATED 1.3.2007 ISSUED BY PETITIONER TO MINISTRY OF DEFENCE.

EXT.P5(A) TUE COPY OF LETTER DATED 17.3.2007 ISSUED BY PETITIONER TO THE SECRETARY, MINISTRY OF SHIPPING.

EXT.P5(B) TRUE COPY OF LETTER DATED 8.3.2007 ISSUED BY PETITIONER TO 1ST RESPONDENT.

EXT.P5(C) TRUE COPY OF LETTER DATED 20.3.2007 ISSUED BY PETITIONER TO MINISTRY OF DEFENCE.

EXT.P5(D) TRUE COPY OF LETTER DATED 21.3.2007 ISSUED BY PETITIONER TO CWP&A

EXT.P5(E) TRUE COPY OF FAX DATED 5.3.2007 ISSUED BY PETITIONER TO 1ST RESPONDENT.

EXT.P6 TRUE COPY OF FAX DATED 30.11.2006 ISSUED BY PETITIONER TO 1ST RESPONDENT.

EXT.P7 TRUE COPY OF FAX DATED 3.4.2007 ISSUED BY 1ST RESPONDENT TO PETITIONER.

EXT.P8 DIAGRAM SHOWING THE ITEMS THAT WERE REQUIRED TO BE INSTALLED/SUPPLIED AS PER THE QUOTATION.

EXT.P9 RESUBMITTED PRICE BID DATED 27.11.2007.

EXT.P10 SKETCH SHOWING VARIOUS PARTS OF TYPICAL AIRCRAFT CARRIERS.

EXT.P11 A COMPARATIVE STATEMENT SHOWING THE BREAK-UP OF PRICES.

EXT.P12 COPY OF THE RELEVANT EXTRACT (PARA 14.4) OF THE CVC GUIDELINES FROM THE DEFENCE PROCUREMENT MANUAL.

EXT.P13 PETITIONER'S LETTER HED/CL-2/ASP/301261/P(BDS) DATED FEB. 12, 2007.

EXT.P14 PETITIONER'S LETTER DATED 1.3.2007.

EXT.P15 COPY OF REPLY DATED 3.3.2007 ADDRESSED BY CSL..

RESPONDENTS' EXHIBITS:

EXT.R1(A) TRUE COPY OF THE COMMUNICATION DATED 28TH AUG. 06 SENT TO THE PETITIONER.

EXT.R1(B) TRUE COPY OF THE COMMUNICATION DATED 28.8.06 SENT TO THE 2ND RESPONDENT REQUESTING THEM TO PLACE MOST COMPETITIVE PRICE BIDS.

EXT.R1(C) TRUE COPY OF THE E. MAIL DATED 30TH NOV. 06 FROM THE PETITIONER TO THE 1ST RESPONDENT.

EXT.R1(D) TRUE COPY OF THE SCHEDULE SHOWING THE DEVIATIONS TAKEN BY THE PETITIONER AND THE 2ND RESPONDENT, DATED NIL.

EXT.R1(E) TRUE COPY OF THE MINUTES OF THE MEETING DATED 19.12.2006.

EXT.R1(F) TRUE COPY OF THE MINUTES OF THE MEETING DATED 20.2.2007.

EXT.R1(G) TRUE COPY OF THE MINUTES OF THE MEETING DATED 20.4.2007.

EXT.R1(H) TRUE COPY OF DETAILED CALCULATION OF THE ORIGINAL QUOTE SUBMITTED BY L & T AND GSL DATED NIL.

EXT.R1(I) TRUE COPY OF TENDER COMPARISON WORK SHEET IN REGARD TO ON BOARD AND LONG LEAD SPARES OF ORIGINAL QUOTE DATED NIL.

EXT.R1(J) TRUE COPY OF THE NPV CALCULATIONS IN RESPECT OF L& T AND GSL IN REGARD TO ORIGINAL QUOTE.

EXT.R1(K) TRUE COPY OF THE DETAILED CALCULATION STATEMENT IN REGARD TO L& T AND GSL IN RESPECT OF THE REVISED QUOTE DATED NIL.

EXT.R1(L) TRUE COPY OF THE NPV CALCULATIONS OF THE REVISED QUOTE OF GSL AND L& T.

EXT.R1(M) TRUE COPY OF THE PRICE BID DATED 27.11.2006 ISSUED BY THE PETITIONER IN RESPECT OF ON BOARD AND BASE AND DEPOT SPARES AND TOOLS.

EXT.R1(N) TRUE COPY OF THE E. MAIL DATED 13.3.2007 ISSUED BY THE FIRST RESPONDENT TO THE PETITIONER.

EXT.R1(O) TRUE COPY OF THE E. MAIL DATED 13.3.2007 ISSUED BY PETITIONER TO THE SECOND RESPONDENT.

EXT.R1(P) TRUE COPY OF THE REPLY MAIL DATED 14.3.2007 ISSUED BY PETITIONER TO THE FIRST RESPONDENT.

EXT.R1(Q) TRUE COPY OF THE E. MAIL DATED 14.3.2007 ISSUED BY SECOND RESPONDENT TO THE FIRST RESPONDENT.

EXT.R1(R) TRUE COPY OF THE CONTRACT NO. PO/ADS/ACI/000552/07-08 DATED 7.8.2007 BETWEEN FIRST RESPONDENT AND SECOND RESPONDENT.

EXT.R2(A) TRUE COPY OF THE LETTER DATED 28.3.2007.

EXT.R2(B) TRUE COPY OF THE TERMS AND CONDITIONS.

// TRUE COPY//

PS TO JUDGE

K. M. JOSEPH, J.

W.P.C. NO. 12354 OF 2007 U

Dated this the 12th December, 2007

JUDGMENT

Petitioner Company has approached this Court impugning Exts.P4 and P6. A mandamus is sought directing the first respondent to consider the bids received in response to the original tender enquiry as per Ext.P1 from the petitioner and the second respondent and to award the contract to the petitioner being the lowest bidder. A further mandamus is sought commanding the first respondent not to consider the bid offered by the second respondent as it was against the basic terms and conditions of the tender. Finally, a declaration is sought that the tender offered by the second respondent is invalid and further to declare that the petitioner is entitled to be awarded the contract in question.

2. The case of the petitioner, in brief, is as follows:

Petitioner is a Company carrying on business, inter alia, in Design, Manufacture, Engineering, Installation and

Commissioning of Defence, Nuclear Power and Aerospace Equipment, Process Plant Equipment, Fertilizer, Petrochemicals and Heat Transfer Equipments, Coal Glasifiers & Thermal Power Plant Equipment, Refinery, Cracker Plant and Oil and Gas Equipment. The Government treats the petitioner as a strategic Company for the country's interest which is evident from the share holding of Public Financial Institutions, which is almost 35%. The first respondent is the Cochin Shipyard Limited. It is a Government of India Enterprise, carrying on business, inter alia, in Ship Building, including building of Naval Ships for the Defence of the country (It is hereinafter referred to as CSL). The second respondent is also a Government of India Enterprise, carrying on business, inter alia, in construction of Naval Ships and also deals in Marine Engineering Equipments for Indian Navy (hereinafter referred to as GSL). CSL invited tender on 23.2.2006 for shafting system for manufacture of Indigenous Aircraft Career Project of Indian Navy. The invitation by the CSL was limited to the petitioner

and GSL. Both the petitioner and GSL are nominated by the Indian Navy. Petitioner and GSL submitted their bids in response to the said tender. The technical bids were opened earlier and the price bids were opened on 4.12.2006 at the office of the CSL and negotiations were held both on technical and commercial aspects. It is the further case of the petitioner that as per the clarifications offered by CSL, delivery of the equipment in two groups and quoting of payments accordingly was considered as mandatory by it. The first group consisted of Intermediate shafts OD Box, Plummer Box, Bulk Head Seals, Stern Tube and Water Lubricated Bearings, Hydraulic Units and all accessories to be positioned inside the main hull. The first grouped items are to be delivered by August, 2008 and the second group comprised of tail shafts, stern tube shafts and CPP. The second grouped items are to be delivered by August, 2010. Ext.P3 is produced as the copy of the further clarification issued by CSL. It is stated that the petitioner submitted Ext.P3(a) requesting consideration of the credentials of the petitioner and

delineating the foreign exchange component submitted by GSL. Ext.P3(b) is produced to show that it is emphasised that all effort should be made by the supplier of propulsion equipment to establish local support. It is stated that it is learnt by the petitioner that it was the lowest bidder in respect of the main equipment. The petitioner's bid was for Rs.132.48 crores, while that of GSL was for Rs.142.95 crores. This was in respect of a main equipment, namely the shafting system. But, the price in respect of the Base and Depot Spares is stated to be higher than the price quoted by GSL. It is further stated that though C.P.P. is an item to be supplied in the second group, it is essentially to be used while delivering the first grouped items. It costs about Rs.30 crores. Petitioner alleges that it had quoted the price taking into consideration the fact that the Propeller which is to be supplied after four years in the second group, has to be procured at the time of testing the two items to be supplied in the first group. It is alleged that in pursuit of finalising the tender, many negotiations and correspondence had taken place

between the petitioner and CSL. During the course of the negotiations, petitioner explained that the price of the main equipment was most competitive and the price of the Base and Depot (hereinafter referred to as B & D) spares was high, since the validity required was four years upto 2010. It is also stated that the petitioner informed that if the spares were to be ordered around the same time as the main equipment, petitioner was further willing to reduce the price of the spares considerably. Petitioner has a case that the bid of GSL had foreign exchange content of 87.52 per cent against the generally accepted norms as per the DPP. While so, Ext.P4 was received by the petitioner which is a fax message from CSL and by which the CSL invited revised competitive price bids against the tender in question without any other changes in the techno-commercial requirements. Petitioner feeling aggrieved by Ext.P4, which is described as arbitrary and unscheduled, addressed the Ministry of Defence by Ext.P5 letter dated 1.3.2007. Ext.P5(a) dated 17.3.2007 is alleged to be a letter sent to the Secretary of

Ministry of Shipping. Thereafter, it is stated, however, that keeping in view the keen interest and commitment of the petitioner to participate in a programme of National importance, the petitioner had submitted the second bid with the clear understanding that the first bid by petitioner would be given due consideration. Ext.P5(b) is produced as a copy of the revised bid. It is stated that the petitioner participated in the revised bid negotiations on the advice of the Director of Naval Design which is referred to, inter alia, as follows:

> *"While the subject letter is under examination of MOD, which may take time, M/s. L.& T is advised to participate in the tender process to reaffirm their commitment to service the armed forces."*

Petitioner also issued a letter to CSL dated 5.3.2007, producing it as Ext.P5(c). There is reference to the CSL having modified provisions relating to foreign exchange rate variation to suit the convenience of GSL. Ext.P6 was produced to show the

variation in tender terms regarding foreign exchange rate variation. Ext.P7 is the reply of CSL rejecting the contentions of the petitioner, which is stated to be without valid justification. It is the case of the petitioner that upon opening the revised bids during the deliberations it has come out that the foreign supplier has continued to use GSL as their front for an almost completely imported system with 91.32% import content. Petitioner raised objections and sent representations. There is considerable emphasis laid on the need for indigenisation. It is pointed out that as far as the petitioner is concerned, only 61.78 % of the equipments alone would be imported, while in the case of GSL, it is stated to be 91.32%. It is on these allegations that the petitioner has approached this Court and this Court on 10.4.2007 ordered that the award of contract will be subject to the orders in the Writ Petition.

3. The CSL has filed a Counter Affidavit, inter alia, stating as follows:

The technical bids of the tenders, namely the petitioner and

CSL were scrutinised by the Technical Negotiation Committee. It was found that both the bidders had made a quite a few deviation from the tender terms in the techno-commercial bids placed by them. The Committee made attempts to make them accept the tender conditions as they are. But, both the bidders insisted to retain the same as per their respective tenders. The Committee decided to accommodate the deviations. The deviations were accepted without compromising the overall schedule of the project. The same was communicated to both the bidders and they were to submit their most competitive revised price bid in the light of the techno-commercial deviation accepted by the Committee. The Price Negotiation Committee comprised of Senior Officers of the Ministry of Defence, Ministry of Defence (Finance), Indian Navy and the Officials of CSL. Petitioner who was found to be L1, was asked to bring down its price, as it was found to be excessive and beyond estimate. But, the petitioner neither reduced the price, nor gave justification for the price resulting in the Price Negotiation

Committee recommending re-tendering of the contract, which is accepted by the competent authority. The price bids received pursuant to the re-tendering was opened on 16.3.2007. GSL was found to be the lowest bidder (L1). It is found that the re-tendering saved an amount of Rs.34.74 crores for the CSL in comparison with the earlier tenders placed. Any delay in placing orders would adversely affect the programme of construction. There was no relaxation of essential tender conditions. The tenders were finalised in accordance with the purchase procedure followed by the first respondent and the guidelines of the CVC. It is stated that there was no relaxation of any tender condition as alleged by the petitioner. It is stated that the techno-commercial bids of the two were opened on 17.4.2006 and it was found that both the tenders have taken a number of deviations from the tender conditions - petitioner (11) and GSL (3). Ext.R1(a) is a communication dated 28.8.2006 sent to the petitioner by which the Technical Negotiation Committee after examination of the offers decided to

accommodate the deviations including the time limit specified for delivery of lots, especially those required by the petitioner. It is stated that the price bid of the petitioner placed along with the technical bid on 17.4.2006 was not opened and it remains in sealed covers, and what was opened was the price bids placed by the tenders pursuant to Ext.R1(a) issued to the petitioner and Ext.R1(b) issued to GSL. Petitioner had quoted Rs.125.81 crores as the price of main items. The prices of spares were not considered for deciding the lowest bidder during the consideration of the price bids on 4.12.2006, and if the component of spares were also taken for deciding lowest bidder, GSL would still be the lowest bidder. Regarding the plea that as per DPP, a minimum of 30% indigenisation is the accepted norm, it is stated that compliance with DPP norms is not a tender requirement and it does not apply to the first respondent. It is stated that the delivery of Lot No.1 as offered by the petitioner and GSL were April 2009 and September, 2009 respectively and hence if the requirement of delivery of lot (1) by 2008 is strictly

allowed, both the tenders offered by the petitioner and GSL would be liable to be rejected. It is stated that since the petitioner and GSL were only the available suppliers of the tender items, their bids were not rejected and they were asked to improve their delivery schedules. Regarding the issue of foreign exchange rate variation, it is pointed out that both the tenders had taken deviation in regard to foreign exchange rate variation and the tender terms did not provide for any variation at the very outset. It was initially agreed to modify the tender condition and provide variation in excess of 2% and subject to a limitation of 10%. This was unacceptable to GSL and it was agreed to remove the upper limit. It is communicated to both the bidders requesting them to make changes in the quoted price, if any, on account of the same. Petitioner, however, by Ext.R1(c) E. Mail. dated 30.11.2006 stated that the decision regarding foreign exchange variation had no effect on their quoted price. It is stated that the tender condition does not debar a tenderer from participation on the ground of higher import content. Ext.R1(d)

is produced as the deviation taken by the petitioner and GSL. There is a denial of the allegation that the CSL has extended undue favouritism and weightage to GSL. It is their case that the petitioner and GSL were given equal opportunity. It is stated that in the first tender placed by the petitioner, it was shown delayed delivery of the tendered items by fortytwo months instead of twentyfour months and in two lots instead of one lot as was scheduled. This deviation was accepted by the TNC. There is a saving of Rs. 34.74 crores as a result of re-tendering. It is stated that taking advantage of the fact that cost of spares was not to be taken into consideration for ascertaining the L bidder, the petitioner has quoted abnormally high costs of spares. Realising the implication of cost of spares, the Indian Navy had recommended inclusion of spares while re-tendering. It is stated that that the price quoted by the petitioner was unjustified and CSL having decided on a re-tender and the petitioner having raised fresh bid, it cannot contend at this stage that the initial bid of GSL was defective.

4. A Reply Affidavit is filed by the petitioner on 23.7.2007, wherein, it is, inter alia, stated as follows:

The revised bids were invited for the sole purpose of giving GSL a chance to improve its bid. The bid of the petitioner was reasonable and it is stated to be unreasonable only on account of the totally unrealistic and inaccurate tender estimate of CSL. It is pointed out that for the main equipment, the price of the petitioner was Rs.132.48 crores, while the price of GSL which has now been accepted is Rs.138.22 crores. The allegation that there was saving of Rs.34.71 crores is stated to be totally vague and baseless and without any particulars or calculations. It is stated that the original offer as well as the revised offer of GSL is not in accordance with the mandatory delivery requirements, stipulated in Ext.P3/R1(a). It is stated that GSL enjoyed an unfair and discriminatory cost advantage as a result of GSL offering delivery of the two items in the second lot, instead of the first lot. Petitioner has not been given an opportunity to submit its bids with the said two items to be

delivered in the second lot and GSL's offer is to be rejected at the threshold as it violates the essential terms of the tender relating to the delivery of the items in two specified lots. There is an allegation of undue favouritism, mala fides and arbitrariness vitiating the entire decision making process. Petitioner denies the allegation that GSL is the lowest bidder or that GSL was found to have fulfilled the requisite conditions stipulated in the tender. GSL has enjoyed price advantage against the petitioner by CSL entertaining the former's offer contrary to the essential terms. Such deviations are not listed as permitted in the list of deviations annexed to Ext.R1(d). Equal opportunity was not given to the petitioner and GSL, is the case of the petitioner.

5. An Additional Counter Affidavit is filed by the first respondent on 17.9.2007. Therein, the CSL has, inter alia, stated as follows:

The net present value (hereinafter referred to as NPV) method is adopted for comparing the price bid of different

spares. The revised quotations of the parties are shown. The formula used for calculating the NPV is also given. It is pointed out that the original quote of the petitioner would show that the pay out with onboard & long lead spares was Rs.195.61 Crores while the revised quote of the petitioner was Rs.160.24 Crores. The revised quote of GSL is shown to be Rs.160.87 Crores. This is to show how the first respondent makes a saving of over Rs.34 Crores by not accepting the original bid of the petitioner. Ext.R1(h) is produced as the detailed calculation of the original quote submitted by the petitioner and GSL. It is on the basis of the same that the original quote of the petitioner was found to be Rs.138.16 Crores and that of GSL was found to be Rs.164.83 Crores. Ext.R1(i) is produced as the tender comparison work sheet in regard to the Onboard and long lead spares. Ext.R1(j) is the NPV calculations in respect of the petitioner and GSL. Ext.R1(k) is the detailed calculation statement in regard to the tenderers in respect of revised quote. The NPV calculations of the revised lot of GSL and the petitioner are produced as Ext.R1

(L).

6. Petitioner has filed a Reply Affidavit dated 25.9.2007, purporting to be in relation to the Affidavit dated 11.9.2007 and the Additional Affidavit of first respondent as also to the Counter Affidavit dated 4.9.2007 and Affidavit dated 19.9.2007 of GSL. In the same, it is, inter alia, stated as follows:

All the Rules and requirements of law have been modified, altered, amended, relaxed and/or violated with the sole intention of executing the pre-determined decision of awarding the contract to GSL on the basis of improper and/or invalid documents. It is stated that re-tendering was done only to give GSL a chance to submit valid bid and to improve its bid. It is stated further as follows:

> *"GSL's bid did not comply even with the tender requirements as under:*
>
> *(i) GSL offered delivery of the `OD Box' and `Hydraulic Units' in the 2nd lot instead of the 1st lot.*

(ii) As per the tender, the price was required to be quoted for delivery at 'FOR - CSL stores'. However, GSL had reported a price for delivery at ~C&F - Kochi Port'.

(iii) Since the landed cost was to be compared, as required by the tender, 12.5% VAT would have to be loaded on GSL's price whereas only 4% CST was to be loaded on the petitioner's price. By calling for revised price bids, CSL has not only allowed GSL to correct its bid and to make it compliant with the tender requirement but CSL has also allowed GSL to lower its tax incidence resulting in lower landed cost thereby giving GSL an opportunity to improve its bid.

(iv) GSL had given validity for two costly items of the B & D Spares (viz. Tail Shaft and Propeller Blades) as 3 months as compared to Tender Requirements of 4 years. This obviously lower price with validity of only three months (lower than the petitioner's price with four year validity), was accepted by CSL and eventually

used for NPV Calculations.

(v) GSL has not quoted the delivery period at all for its spares, which has been accepted by CSL. Moreover, undue advantage was eventually given to GRSL by assuming delivery period which result in favourable NPV calculations.

(vi) GSL has not quoted the payment schedule at all for its spares, which has been accepted by CSL assuming payment schedule which result in favourable NPV calculations.

(vii) Clause 16 of tender terms regarding indigenisation has been overlooked to favour GSL."

It is further stated that in the revised tender, the prices of the two long lead items, namely tail shift and propeller blades, were also to be considered to determine who the lowest bidder is. This change was brought about only to give GSL an unfair advantage. In the first round of tenders, it is stated that the bidders were required to quote their prices for several Base and

Depot Spares (B& D). But, in the re-tendering, CSL deleted 47 out of 49 items of B&D spares. After the opening of the price bids (in the first round), CSL knew that the GSL's price for the said two items was substantially lower as compared with the petitioner's price, since the GSL's price is valid for three months only as against the tender requirement of four years validity. It is stated that despite the fact that the said long lead items would be required only at a later stage after several years, CSL manipulated the terms of the revised tender to confer an unfair advantage to GSL. The petitioner's original bid was reasonable. The tender estimate of Rs.108/= Crores was totally unrealistic and inaccurate. The ultimate tender of GSL which has been accepted of Rs.142.75 Crores itself demonstrates how the decision making process smacks of arbitrariness and malafides, favouritism and discrimination. Ext.P12 is the copy of the relevant extract of CVC Guidelines and the estimate of CSL of Rs.108/= Crores is stated to be contrary to the same. It is further stated that the saving of Rs.34.74 Crores alleged by CSL was

also a bogey. Several circumstances are pointed out in support of the said contention. The calculation of savings at Rs.46.86 Crores on account of NPV is totally incorrect and arbitrary. It was pointed out that by Ext.P14, the petitioner had communicated its protest. Ext.P15 is produced as the Reply given by CSL. Even in the revised bid, the GSL offered two items, i.e. OD Box, Hydraulic Units in the second lot, instead of in the first lot. As regards the said two items, GSL offered delivery of the same by 39 months from CED along with the second lot. CSL rewarded GSL for the violations. GSL enjoyed unfair advantage in the calculation of NPV. It was on the basis of GSL's defective bid and the consequential benefits that the GSL enjoyed in the calculation of NPV that CSL found GSL to be the L-1 bidder based on the NPV. What is stated to be even more shocking is that after the bids were opened, CSL allowed GSL to shift the two items from the second lot to the first lot. CSL has been continuously changing the tender to suit the conditions favourable to GSL. Mala fides is apparent. It is only

on 20.4.2007 that Price Negotiation Committee requested GSL to improve the delivery periods offered by them and in the said meeting GSL agreed to do so. Therefore, the letter dated 28.3.2007 produced by GSL as Ext.R2(a) is alleged not to exist on the said date. It is stated that GSL cannot claim any equities stating that the letter of indent has been issued in its favour and formal contract was entered on 7.8.2007 in view of the interim order passed by this Court.

7. A Reply Affidavit has been filed by the first respondent purporting to controvert the case set up by the petitioner in the Reply Affidavit dated 25.9.2007 filed by the petitioner. Affidavits have been filed by the second respondent.

The parties relied on a fairly large body of case law. They are:

(1) Asia Foundation & Construction Ltd. v. Trafalgar House Construction Ltd. and Others ((1997) 1 SCC 738).

(2) Raunaq International Ltd. v. I.V.R. Construction Ltd. and Others ((1999) 1 SCC 492).

(3) Air India Ltd. v. Cochin International Airport Ltd. and Others ((2000) 2 SCC 617).

(4) Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and Others ((2000) 5 SCC 287).

(5) W.B. State Electricity Board v. Patel Engineering Co. Ltd. and Others ((2001) 2 SCC 451).

(6) Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and another ((2005) 6 SCC 138).

(7) Reliance Airport Developers (P) Ltd. v. Airports Authority of India and Others ((2006) 10 SCC 1).

(8) B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Others ((2006) 11 SCC 548).

In Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd. and Others ((1997) 1 SCC 738), the Apex Court held as follows:

> *"Though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the large public interest or if it is brought to the notice of the court that in the matter of award of a contract*

power has been exercised for any collateral purpose. It is not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favouritism in the grant of contract in favour of the successful bidder."

"The High Court was not justified in interfering with the award by going into different clauses of the bid document and then coming to the conclusion that the terms provided for modifications or corrections even after a specified date and further coming to the conclusion that respondent 1 being the lowest bidder there was no reason for the Port Trust to award the contract in favour of the appellant."

In Raunaq International Ltd. v. I.V.R. Construction Ltd. and Others ((1999) 1 SCC 492, the Apex Court held as follows:

"This is not a case where any mala fides have been alleged against any member of the

Board. Nor is there any allegation of any collateral motive for awarding the contract to the appellant. The only ground of challenge was that the appellant did not fulfil the qualifying criterion of having laid such pipeline for a distance of 3 kms. But, the challenger, the respondent, also did not fulfil the qualifying criterion. Therefore, any judicial relief at the instance of a party which does not fulfil the requisite criteria seems to be misplaced"

"When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. Priced may not always be the sole

criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the qualify of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work - which is as much in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee."

In AIR India Ltd. v. Cochin International Airport Ltd. and Others ((2000) 2 SCC 617), the Court held as follows:

"It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision making process and interfere, if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires

interference, the court should intervene."

In fact, that was also a case where an allegation was raised that the employer acted under the influence of the National Airlines and the Ministry of Civil Aviation. In Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and Others ((2000) 5 SCC 287), the Apex Court held as follows:

> *" Judicial decisions in the matters of tender process and award of contract show that while public interest is paramount, there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. The legal position can be summed up as thus:*
>
> > *(i) The Government is free to enter into any contract with citizens but the court may interfere where it act4s arbitrarily or contrary to public interest.*
> >
> > *(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or*

> *to discriminate between persons similarly situate.*
>
> *(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.*
>
> Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide."

That was a case where the Apex Court approved of the High Court setting aside the award of contract, for the reason that the awardee had not fulfilled the condition relating to a clause in the tender notice, but the same was deleted subsequent to the last date of acceptance of tender. In W.B. State Electricity Board v. Patel Engineering Co. Ltd. and Others ((2001) 2 SCC 451), the Apex Court held as follows:

> *"In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity."*

In Master Marine Services (P) Ltd. v. Metcalfe & Hodokinson (P) Ltd. and Another ((2005) 6 SCC 138), the Apex Court held as follows:

"The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, should the court interfere."

"The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person

tendering is of the ability to deliver the goods or services as per specifications. The State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation."

In B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Others ((2006) 11 SCC 548), the Apex Court reviewed the case law on the point and held, inter alia, as follows:

"The following legal principles are applicable to the award of government contracts/tenders:

(i) The requirements in a tender notice can be classified into two categories; those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary to the main object to be achieved by the condition.

(ii) If there are essential tender conditions, the same must be adhered to. If a party fails

and/or neglects to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others.

(iii) If there is no power of general relaxation of tender conditions, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for

consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction.

(iv) If there is no general power of relaxation of tender conditions, and if, however, a deviation is made in relation to all the parties in regard to any of such tender conditions, ordinarily again a power of relaxation may be held to be existing. The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction.

(v) When a decision is taken by the appropriate authority upon due consideration of the tender documents submitted by all the tenderers on their own merits and if it is untimely found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.

(vi) Where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

(vii) As huge amounts of public money may be involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it.

(viii) A contract need not be given to the lowest tenderer and the employer is the best judge therefor; the same ordinarily being within the employer's domain, court's interference in such matter should be minimal. The High Court's

jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record. The employer concededly is not bound to accept a bid only because it is the lowest. It must take into consideration not only the viability but also the fact that the contractor would be able to discharge its contractual obligations. It must not forget the ground realities.

(ix) Law operating in the field is no longer res integra. The application of law, however, would depend upon the facts and circumstances of each case. The terms contained in the notice inviting tender may have to be construed differently having regard to the fact situation obtaining in each case. No hard-and-fast rule can be laid down therefor."

8. By Ext.P1, CSL invited limited tenders from the petitioner and GSL. Both the tenderers have the support of the

Indian Navy. The competence of the GSL in executing the work is unquestioned. Petitioner gave its bid dated 15.4.2006. However, it is undisputed that there were various negotiations and communications between the parties. Ultimately, Ext.R1(a) dated 28.8.2006 was issued to the petitioner and Ext.R1(b) came to be issued to the GSL. Ext.R1(a) corresponds to Ext.P3. Pursuant to Ext.R1(a), petitioner has submitted Ext.P9 revised bid dated 27.11.2006. On 4.12.2006, the price bids with tenders were opened. It was found that the bid of the petitioner is the lowest and it came to be classified as L-1. Petitioner came to be called for negotiations. The negotiations took place on 19.12.2006 and 20.2.2007. Ext.R1(e) produced along with the petition dated 11.9.2007 by the first respondent purports to be the Minutes of the Meeting dated 19.12.2006. Ext.R1(f) produced under the same petition purports to the the Minutes of the Meeting dated 20.2.2007. A perusal of the aforesaid Minutes would appear to show that the Price Negotiation Committee found that the price quoted by the petitioner was

excessive. It is to be noted that the Price Negotiation Committee as evidenced by Ext.R1(e) dated 19.12.2006 consisted of, besides the Officers of the first respondent, Captain Shri R.K. Rana representing DND, MOD and MOD (F). Therein, the Price Negotiation Committee expressed that the quote of the petitioner is very much on the higher side. It shows further that the Committee requested the petitioner to give justification for giving such a quote. The contents of Ext.R1(e) is extracted below:

> *"2. M/s. CSL informed that the Techno Commercial evaluation report has the approval of competent authority in file no. SDD/ADS/725/05 Vol.III minute 350.*
>
> *3. The Chairman welcomed the participants. The PNC then went through the quote given by M/s. L & T and expressed that their quote is very much on the higher side. PNC requested L & T to give justification for giving such a quote. L & T replied that they had*

participated in a competitive bid and they being L1, their bid should be accepted without further negotiation. This was not agreeable to PNC.

4. PNC pointed out that L & T had quoted for P17 in 1999 and their price should be comparable with that quoted price with due scaling and escalations.

5. L & T replied that the price cannot be compared with P17 as the business environment has changed considerably since 1999. The sources for the required raw materials are also limited and not available in the required time frame and hence cost of these is high.

6. They were also asked to explain the rational behind quoting Rs.60,000/= per day for their service engineer. L & T insisted that being L1, the order may be issued to them without further negotiation. However, L & T came up with the following explanation that their service engineer charge of Rs.60,000/= per man day is valid till year 2015 and their engineer was paid

Rs.20,000/= in the year 2000 by GRSE. They also stated that for another order from GRSE in the year 2006 the rate is Rs.35,000/= per day rate valid upto 2008. They claimed that quote of Rs.60,000/= for the service engineer is justifiable by escalating the above rates. The above rate was not acceptable to PNC on the basis of other purchase orders for ADS equipment placed recently.

7. L & T stated that their quote for P71 consists of 66% material cost and 34% value addition. They also stated that for P17a displacement was 4500 Tons and that for P71 was 37500 Tons. Hence the cost should be 8.3 times that of P17. This justification was not acceptable to the PNC as there is no logic for accepting displacement as the basis.

8. Since L & T did not explain how the quoted price is arrived to ascertain price reasonableness, the Chairman of PNC requested L & T to review and offer reasonable reduction in their quoted price and revert with proper

justification within a period of seven days."

9. Ext.R1(f) Minutes of the Meeting of the Negotiation Committee would appear to show that the petitioner was again requested to explain the reasonableness of the price quoted. The petitioner appears to bring out that the degree of complexity in the P71 shafting and propeller compared with the other Naval Ships and explained that the same will lead to additional infrastructure. There is reference to increase in metal prices for steel, nickel and copper, etc. The following recommendations are seen made:

> *"7. PNC observed that M/s. L&T was unable to convince the reasonableness of the quoted price and the price of the B&D spares are also high compared to the price of base equipment. M/s. L&T has also expressed inability to reduce the price nor justify the reasonableness of quote and convince PNC even after repeated requests.*

> *8. Further, PNC is of the considered view that it would be more prudent to place the order for the OEM recommended OBS as well as the long lead and costly B & D spares, namely tail shaft and three propeller blades each of port and starboard propellers, along with the main equipment. This would bring in large savings to the exchequer. Hence PNC unanimously recommends to re-tender and request both bidders M/s. L&T and M/s. GSL for a revised reduced price bid including the spares as above, without any change in the techno-commercial requirements. Comparison for determining L1 is to be carried out including the above spares. In the revised bid the suppliers shall quote for main equipment, installation and commissioning spares & tools, OEM recommended Onboard spares/tools for 2 years service and long lead spare items, namely blades (3 each for Port and Stbd propellers) and one spare tail shaft."*

Apparently, it is following the said recommendation that Ext.P4 dated 23.2.2007 is issued by CSL by which the petitioner was

invited to submit revised tender. Petitioner submitted Ext.P5(b) bid. No doubt, petitioner has alleged that it has addressed the Director General (Acquisition) in the Ministry of Defence, pointing out its objection to Ext.P4, by Ext.P5 dated 1.3.2007. So also, Ext.P5(a) E-mail is produced seeking urgent intervention to put on hold the re-tendering process. This is addressed to the Secretary, Shipping, New Delhi and is seen dated 17.3.2007. Besides, the petitioner has also addressed Ext.P14 dated 1.3.2007 to CSL, protesting the procedure in issuing Ext.P4. Ext.P15 is produced as the reply given to the petitioner dated 3.3.2007 by CSL. CSL has proceeded to find that GSL is entitled to be treated as L-1. Thereafter, the Writ Petition is filed on 9.4.2007. Ext.R1(g) is the proceeding of the Price Negotiation Committee evidencing the negotiation between CSL and GSL, dated 20.4.2007, which means that it is pending the Writ Petition and the interim order dated 10.4.2007 that the award of the contract will be subject to the orders in the Writ petition. Pending the Writ Petition also, Ext.R1(r) contract

is entered into dated 7.8.2007 between the CSL and GSL.

Contentions of Petitioner:

10. Petitioner being the L-1 on the basis of Ext.P9 bid was entitled to be awarded the contract. The decision to go in for re-tender as evident from Ext.P4 is illegal. Going by the DPP, the bid of the petitioner ought to have been accepted. The foreign exchange component involved in the bid of GSL is as high as 87.52%, the indigenous content is only 12.48%. The accepted norms as per the DPP, 2006 specifies 30% minimum indigenisation. The reason for not accepting Ext.P9 bid of the petitioner, namely that the bid of the petitioner is unreasonably high, cannot be sustained. Rs.108 Crores, which is stated to be the estimate on the basis of which it is found that the price bid of the petitioner in Ext.P9 is excessively high, is unrealistic and against the guidelines of the CVC. Therefore, Ext.P4 is issued and re-tender is resorted to, only to help GSL to make a bid which is compliant. It was intended to confer an undue

advantage on GSL. It is contended further that the tender submitted by GSL violated the essential terms of the tender as seen crystalised in Ext.P3. It is submitted that there were negotiations and correspondence between the parties after they had submitted the bid pursuant to Ext.P1. But, the conditions which were acceptable came to be articulated in Ext.P3. They include the condition as to delivery schedule which reads as follows:

> ***"2. Delivery Period***
>
> *It has been decided to stagger the scope of Shafting and CPP into two groups and modify the delivery time for the respective groups in the following manner. Stage payments are to be quoted accordingly. Please confirm:*
>
> *a) Intermediater shafts, OD box, Plummer blocks, Bulkhead seals, stern tube and Water lubricated bearings, hydraulic units, and all accessories to be positioned inside the main hull - Delivery by Aug, 2008.*

b) Intermediate shafts, Tail shafts, Stern tube shafts and CPP - Delivery within Aug, 2010."

It is further contended that the original bid of GSL violated the terms of the tender in so far as GSL has quoted price for delivery at C & F Cochin Port, when the price was required to be quoted as per the tender for delivery at FOR - CSL Stores. It is further contended that GSL has not quoted the payment schedule at all for its spares. It had not quoted the delivery period at all for all its spares which has been accepted by CSL. The landed costs was to be compared as required by the tender. This meant that 12.5% to VAT would have to be loaded on GSL's price whereas only 4% CST was to be loaded on the petitioner's price. By calling for revised bids, CSL has allowed not only GSL to correct its bid and to make it compliant with the tender requirement, but it also allowed GSL to lower its tax incidence resulting in lower landed cost, thus giving GSL an opportunity of improving its bid. It is further complained of that the validity given by the GSL for two costly items of B & D

spares with tail shaft and the propeller blades is three months as compared to the tender requirement of four years. It is further submitted that in fact the GSL was not entitled to its bid being reckoned as L-1. Learned senior counsel also points out that there is a clear violation of the essential tender conditions, in so far as the GSL in its original bid and the revised bid has contemplated effecting delivery of items contrary to the mandatory requirement in the delivery schedule referred to in the Clause hereinbefore extracted. In other words, the very bid of GSL ought to have been rejected for the reason that GSL proposed to deliver the OD Box and the Hydraulic units which, as per Ext.P3, were to be delivered by August, 2008 in the first lot, only in the second lot. It is contended that as GSL has proceeded in its bids to offer delivery of these two items only much later on as part of the second lot, GSL became entitled to a great price advantage over the petitioner as the status of lowest tenderer is decided by employing the NPV. It is thus contended that GSL proceeded to make bids both original and revised,

violating the stipulation as to delivery contained in Ext.P3 and instead of such bids being discountenanced, GSL came to be rewarded by CSL approving of the breach of the essential terms by GSL and calculating the Net Present Value on the said basis and thus finally, illegally finding that the GSL is L-1. It is further contended that after GSL was found thus to be L-1 and during the pendency of the Writ Petition the Price Negotiation Committee held negotiations with GSL as evident from Ext.R1 (g) dated 20.4.2007, in the course of which the GSL is permitted to alter its bid whereby it agrees to supply the OD Box and Hydraulic Units in the first lot, instead of in the second lot. Learned counsel for the petitioner would point out that the entire action of CSL is arbitrary and contrary to the law as laid down in a catena of decisions. It is pointed out, in fact, that while CSL was unable to accept the bid of the petitioner involving payment of Rs.60,000/= per man day to its Engineer, it had no qualms in accepting payment to the Engineer proposed by GSL at the rate of 1900 Euros. Petitioner also pointed out that really, there is

no saving of Rs.34.74 Crores as contended by GSL by going in for re-tendering. It is also pointed out in this connection that a perusal of Ext.P13 communication issued by the petitioner dated 12.2.2007 would unambiguously show that the petitioner was amenable to reduction of 18.59 crores. It was without considering the said offer that the PNC recommended re-tender and the revised bids were called for vide Ext.P4. It is pointed out that CSL has manipulated the terms of the revised tender to suit the interest of GSL. In the first round of tenders, the bidders were required to quote their prices for several Base and Depot spares. However, in re-tendering, CSL deleted 47 of the 49 items of B & D spares. It is the petitioner's case that after opening of the price bids in the first tender, CSL knew that the prices offered by GSL for two items which were re-tendered, were substantially lower as compared to the petitioner's price.

Findings:

11. The first question to be considered is whether the petitioner is entitled to a writ of mandamus directing CSL to

consider the bid received in response to the original tender enquiry as per Ext.P1 from the petitioner and GSL, and to award the contract to the petitioner, being the lowest bidder. This prayer is inextricably inter-twined with the first prayer, namely a writ of certiorari seeking to quash Exts.P4 and P6. The original price bid submitted by the petitioner pursuant to Ext.P1 has not been acted upon. Counter Affidavit of respondent No.1 would show that it was not opened. Admittedly, there were negotiations and correspondence between the parties. This resulted in Ext.P3 being issued. It is pursuant to Ext.P3 that the petitioner had submitted Ext.P9 bid. It is not in dispute that applying the relevant yardsticks, the petitioner came to be reckoned as the lowest tenderer. Petitioner was called for negotiations. Exts.R1(f) and R1(e) Minutes of the Meeting of the Price Negotiation Committee will undoubtedly reveal that the Price Negotiation Committee which, besides Officers of CSL, consisted of the Official representing the Ministry of Defence. The Ministry of Defence is not made a party to the

Writ Petition. The Price Negotiation Committee took the view that the bid of the petitioner was exceedingly high. When Ext.P9 was considered, no doubt, the question as to who was to be reckoned as L-1, had to be determined on the basis of the price bid relating to the main equipment. The bid in relation to the spares though separately insisted upon, was not relevant for determining L-1. The bid of the petitioner is Rs.138.16 Crores without spares, inclusive of tax. According to CSL, though the petitioner was L1, the price quoted by the petitioner in regard to spares was also on the high side. The estimate prepared by CSL reflected a price of Rs.108 Crores. Undoubtedly, the price offered by petitioner was far in excess of the estimate. Petitioner, no doubt, has a case that the estimate prepared itself is unrealistic. I would not think that this Court should be called upon in judicial review to consider whether the estimate price of CSL is unrealistic. It is settled law that generally a tenderer has no legal right to have its tender accepted for the reason that its tender is lowest (**See *B.S.N. Joshi & Sons Ltd.*** v.

Nair Coal Services Ltd. and Others - (2006) 11 SCC 548). No doubt, petitioner has set up a case that under the terms of the DPP, petitioner being the lowest tenderer, CSL was obliged to accept the tender of the petitioner. The definite case set up by CSl is that the DPP does not apply to CSL. I do not think that the petitioner has been able to establish that the DPP is applicable and CSL is bound therefore, to accept Ext.P9 price bid. I am equally unimpressed by the contention taken by petitioner based on the foreign exchange component of the bid of GSL. This argument is essentially based on the allegedly accepted norms as per the DPP prescribing minimum thirty per cent indigenisation. I have already found that DPP does not apply. Compliance with DPP norms apparently is not a tender requirement. Therefore, acceptance or rejection cannot be premised on compliance or non-compliance with DPP norms. I do not see merit in the challenge to Ext.P6, particularly in the light of Ext.R1(c) issued by petitioner. Therefore, I reject the contention of the petitioner that the petitioner is entitled to have

Ext.P9 bid accepted compulsorily by CSL. In view of the settled position that CSL could not be compelled to accept Ext.P9 bid of the petitioner on the score that the petitioner was L-1, it may not be open to the petitioner to persuade this Court to compel CSL to accept Ext.P9 bid even after the Price Negotiation Committee which, as already noted, consisted of not only the Officers of the CSL but also the Representative of the Ministry of Defence, found that the price offered by petitioner is excessive and recommended re-tender. It is to be noted that CSL has invited only the petitioner and GSL being the only two competent parties who are also sponsored by the Indian Navy. CSL is a Public Sector Undertaking. If the competent authority in CSL decided to accept the recommendations of the Price Negotiation Committee and decided to re-tender and call for revised tenders from the petitioner and GSL, in an attempt at getting a better financial offer, I do not think it may be open to this Court to veto such a decision. As already found, the fact that the petitioner's tender was the lowest, does not clothe it

with a legal right to demand its acceptance by the employer. While it may be true that the petitioner had addressed Ext.P5 to the Director General (Acquisition), Ministry of Defence and Ext.P5(a) to the Secretary Shipping, and the petitioner may have been advised to participate pursuant to Ext.P4 as alleged by it in paragraph 10 of the Writ Petition, to re-affirm their commitment to service the Army Force by the Directorate of Naval Design, the question is whether the petitioner can be permitted to challenge Ext.P4. It is to be noted that the Directorate of Naval Design is not made a party to the Writ petition. The Ministry of Defence is not made a party. The Secretary Shipping is not made a party. No doubt, the petitioner has addressed Ext.P14 dated 1.3.2007 to CSL complaining about the procedure on receipt of Ext.P4. A perusal of Ext.P15 reply dated 3.3.2007 given by CSL, would appear to me to show that CSL had reiterated its stand that the price quoted by the petitioner is high and they failed to justify the reasonableness of the quoted price and they were not inclined to bring down the price. It is also

noted in Ext.P15 that the quoted price for spares was found exorbitantly high and could not be justified by any standards. Thereafter, there is reference to the recommendation of the Price Negotiation Committee and finally the CSL requested the petitioner to appreciate the position and to submit their most competitive tender in sealed cover. It is, therefore, clear that there is absolutely no assurance given by CSL that the petitioner can participate by reserving any right to challenge the decision to re-tender the contract. Therefore, as between the petitioner and CSL, it may not be open to the petitioner to rely on communications made with persons who are not made parties to the Writ Petition and whose advice, at any rate, cannot either bind CSL nor empower the petitioner to participate in the re-tender and thereafter seek to impugn the re-tender. At any rate, I would think that it cannot be found that the decision of CSL to re-tender the contract vide Ext.P4 is liable to be dubbed as illegal or arbitrary. I am equally unimpressed by the contention raised by the petitioner that CSL and the Price Negotiation

Committee have acted in disregard of the offer made by petitioner vide Ext.P13 to lower the price by more than Rs.18 Crores. It is the case of the petitioner that by Ext.P13, the petitioner had offered to reduce the price by over Rs.18 Crores in regard to its spares. But, as correctly pointed out by CSL, the offer is conditioned upon the order being placed for the spares along with the main equipment. According to CSL, such a condition would have involved the modification of the terms of the tender. It is also pointed out by it that willingness to reduce the price of spares which was not used for price comparison is irrelevant and unacceptable as if the price of spares were also used for comparison, the petitioner would not have become the lowest during the original bid. Also it is pointed out that the petitioner was not willing to give reduction in price of the main item. It is also pointed out by CSL that the price quoted by petitioner in Ext.P13 is Rs.32.71 Crores as against the price offered by GSL which was Rs.14.41 Crores. At any rate, I would think that in view of the fact that the condition attached to

the offer in Ext.P13 necessarily involved a modification of the tender condition, it may not be open to the petitioner to contend that the decision taken by CSL accepting the recommendation of the Price Negotiation Committee to go in for re-tender is invalid.

12. The next question to be broadly considered is whether the decision to go in for re-tender is to be unsettled on the score that it was intended to confer an undue favour on GSL. This question, I would think would be better answered, if I also pose some of the other issues which are raised by the petitioner, which I think, have a bearing on the issue. Was it incumbent on CSL to reject the original and revised bid of GSL for the reason that GSL offered to deliver the materials contrary to the delivery schedule which is referred to in Ext.P3? Was the re-tender intended to enable to GSL to extricate itself from the position consequent upon GSL offering the price for delivery at C & F Cochin Port, instead of FOR, CSL ? Likewise, is the complaint of petitioner that the calling for the revised price bids was

intended to allow GSL to correct its bid in the context that the tender requirement was that the landed cost to be compared at 12.5% VAT would have been loaded on GSL's price whereas only 4% CST was to be loaded on the petitioner's price, correct. It is the petitioner's case that GSL was allowed to lower its tax incidence in the revised bid. Likewise, GSL had given validity for two items of the B & D spares as three months as compared to the tender requirement of four years. Non-quoting of payment schedule of all spares by GSL and also the non-quoting of the delivery period for all its spares are all pointed out as circumstances which show that CSL conferred an undue advantage to one tenderer. Likewise, in the re-tendering, the CSL deleted 47 out of the 49 items of B & D spares. In the first round of tenders, the bidders were required to quote their prices for several B & D spares. After the opening of the price bids, CSL knew that the price of GSL for two items which were not deleted in the re-tendering was substantially lower as compared with the price bids as price of GSL was valid for three months

instead of the tender requirement of four years. Though the said long lead items were required only at a later stage after several years, petitioner contends that CSL manipulated the terms. The contention raised by CSL in answer to it is that CSL treated both parties equally. It is pointed out that CSL had called for only a limited tender, namely the petitioner and GSL. Both the tenderers were sponsored by the Indian Navy. As the Price Negotiation Committee found that the price bid of the petitioner was excessive and the petitioner was not willing to reduce its price, a re-tender was unavoidable. CSL had only accepted the recommendation of the Price Negotiation Committee. It is a Public Sector Unit and it was to uphold the public interest and save public funds that the decision was taken, it is contended. It is pointed out that the Court must bear in mind that the choice of CSL was to either accept the petitioner's bid which was found to be excessive or to go in for re-tender. The field of choice was limited to the petitioner and GSL, both being sponsored by the Indian Navy. Regarding the deletion of 47 out of 49 spares, it

is the case of CSL that the price of the 47 spares was lower. It was accepting the recommendation of the Price Negotiation Committee that it was decided to take into consideration the value of spares, for reckoning L-1 in the revised bid. In so doing, it was felt that the price of the two spares which were not deleted was high and the revised quotes were called for in this context.

13. It is true that Ext.P3 was issued by CSL following negotiations and correspondence between the parties. A perusal of Clause (2) would show that the acceptance of the Clauses in the Annexure is mandatory for technical acceptance of the offer. It is also stated that CSL reserves the right to reject tenders not fully complying with all techno-commercial requirements. Delivery period is a clause shown under the commercial points and I have already extracted the same. In Ext.P4 also, CSL has invited the revised competitive bids without any change in the techno-commercial requirements of the price bids submitted on 28.11.2006. CSL has reserved its right to reject any offer

submitted not in compliance with the tender and strictly in the price bid format attached. It is true that GSL has given their bid pursuant to Ext.P3 and thereafter pursuant to Ext.P4, proposing to deliver the OD box and the Hydraulic Units in the second lot. In this connection, it is to be noted that the offer of the petitioner itself was to deliver lot No.1 by April, 2009, while the offer of the GSL was to deliver lot No.1 by September, 2009. Thus, strictly speaking that if the tender conditions were enforced, the offer of the petitioner and GSL were only to be rejected. Apparently, Exts. R1(n) & R1(o) were issued to the petitioner and GSL calling upon them to improve their delivery schedule and the petitioner replied vide Ext.R1(p). Therein, the petitioner stated that as of now the delivery stands as given in their P-bid. It is, however, stated that they are in touch with their vendors for improving the delivery and the same can be discussed during PNC. GSL replied by Ext.R1(q). Therein, they have stated that they will try their best to improve their delivery schedule to meet the requirement of the first respondent. Ext.R1(q) is dated

14.3.2007. The respondents have a definite case that Ext.R2(a) was sent by GSL further to Ext.R1(q) stating that they were agreeable to giving delivery of OD Box and HPP in the first lot without any changes in the payment terms. Petitioner, no doubt, has a case that Ext.R2(a) is not even referred to by the PNC in its meeting held on 20.4.2007 and no reliance can be placed on Ext.R2(a). No doubt, the price bid was opened on 16.3.2007. Going by Ext.R2(a), GSL had agreed to include the two items in question as part of the first lot and without any change in the payment terms. No doubt, a question is raised as to whether the terms as to delivery including the contents of the lot were essential conditions and there is no power to relax the same. It is apposite to remember the law declared by the Apex Court in B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Others ((2006) 11 SCC 548) that a party who has taken the benefit of relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of the tender. The Court held as follows:

> *"The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction."*

It is beyond doubt that the tender of the petitioner was also not in compliance with the requirements as to the period of delivery.

14. It is to be noted that the petitioner has a case that GSL derived an advantage by offering delivery of the two items in the second lot contrary to the delivery schedule mentioned in Ext.P3 and GSL was not entitled to be L1. This is met by the first respondent by pointing out that they have made necessary price adjustments, thus ensuring that both the petitioner and GSL were treated equally and GSL did not derive any undue

advantage by reason of the fact that GSL was to deliver the two items as part of the second lot. Petitioner would contend that the principle of fairness demanded that the first respondent permitted the petitioner to quote its rates for the items in question in which case alone, the action of the State could be said to be in conformity with the requirements of law. In this connection, I must bear in mind the principle declared by the Apex Court that public interest must be overwhelmingly in favour of the Court interfering with the Award. I would think that the petitioner has not been able to demonstrate the existence of such an imperative public interest so as to warrant interference in the matter.

15. At best, it can be only a highly disputed question of fact as to whether Exts.R2(a) was indeed sent by GSL as claimed by the respondents. No doubt, it could be said that Ext.R2(a) was not sent when the price bid was opened on 16.3.2007. But, I cannot overlook the fact that there were only

two tenderers as sponsored by the Navy, namely the petitioner and GSL. I cannot also overlook the fact that in regard to the time within which delivery was to be effected as indicated in the delivery schedule in Ext.P3 by which the petitioner swears by, petitioner had clearly deviated. I cannot also overlook the plea of GSL that GSL does not stand to gain financially by shifting delivery of the said items from the second lot to the first lot as, though the delivery is to be made during September, 2009, they are entitled to receive the payment of the two items only after the supply of the goods in the second lot in September, 2010. It is to be noted that in Ext.P5(b) revised bid of the petitioner also, the first lot is to be supplied within the following time limit, "CED + 24 months", which will clearly take its delivery beyond the time fixed as per the delivery schedule. I would think that it may not be correct to allege that GSL has received an unfair advantage of quoting for delivery of the two items in question as part of the second lot. This is for the reason that CSL has undertaken necessary price adjustments so as to

obliterate any advantage which GSL would have derived in the calculation of NPV by reason of GSL offering to deliver the items in question on a later day and as part of the second lot. A perusal of Exts.P3 and P4 would show that on the one hand, its acceptance of these Clauses are mandatory for technical acceptance and it is further stated that CSL reserved the right to reject the tenders not fully complying with all techno-commercial requirements. On a conspectus of all these aspects, I would not think that the petitioner has made out a case for interference in the matter. At any rate, I do not see any overwhelming public interest to justify interference in this case.

16. It is to be noted that as regards the complaint of the petitioner which I have referred to, that the attempt of CSL was to make the tender of GSL compliant and to confer an advantage over the petitioner, I would think that when the Price Negotiation Committee decided to recommend the re-tender on the basis that the price bid of the petitioner was excessive and the CSL decided to accept it, the contentions of the petitioner in

this regard would appear to me to be irrelevant and pale into insignificance. In other words, I find that the decision of CSL not to accept the tender of the petitioner which was already L1, is to be sustained. I do not see how the petitioner can point out those circumstances which are mentioned in sub-paragraphs 1 to 7 of paragraph 6 of its Counter Affidavit dated 25.9.2007, to support interference. No doubt, the first respondent has denied the complaints of the petitioner in this regard.

17. Regarding the question relating to the deletion of 47 items of spares and retaining only two of the items, I would think that it may not be correct to characterise the said decision as indicative of the manifestation of the intention on the part of CSL to reach an undue favour to GSL. CSL has specifically pointed out that the 47 spares were all small items of lesser values and the supply would be effected by the manufacturer with a lesser lead time. There was also the recommendation of the Price Negotiation Committee to include the two items in the scope of the re-tender. Apparently, it is the value of the two

spares which continued to remain as relevant, the price of which was on the higher side. I am not inclined to infer that the deletion of 47 spares and the retention of the two spares was afflicted with the oblique motives, the petitioner alleges against CSL. Petitioner would be essentially requesting the Court to enter into the merits of the decision making process in making the aforesaid allegation. As I have found that Ext.P4 is valid, on the basis of the recommendation of the PNC being accepted, it is unnecessary for me to consider whether there is merit in the dispute raised by the petitioner regarding the saving by over Rs.34 Crores alleged by the first respondent. Thus, having regard to the totality of facts, I would think that the Writ petition deserves to be dismissed and accordingly I dismiss the Writ Petition.

K. M. JOSEPH, JUDGE

kbk.